

22 March 2023

Consumer Credit Unit  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [creditreforms@treasury.com.au](mailto:creditreforms@treasury.com.au)

Dear Sir/Madam

### Consumer Credit Regulations

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) has prepared this submission relating to the exposure draft *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulation 2023* (Regulations) and accompanying Explanatory Statement, which were released for public consultation on 20 February 2023. The Committee thanks Treasury for the opportunity to comment on the Regulations.
2. The Regulations amend the *National Consumer Credit Protection Regulations 2010* (Cth) to implement the recent amendments to the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCPA**) made by the *Financial Sector Reform Act 2022* (Cth) to:
  - (a) enhance the consumer protection framework for small amount credit contracts and consumer leases; and
  - (b) implement the government's response to the recommendations of the 2016 Review of Small Amount Credit Contracts (**SACCs**).
3. The Committee's comments on specific provisions of the Regulations are set out below.

### Regulation 28HB—verification of financial situation of consumers

4. Proposed regulations 28HB(6)–(7) would require a SACC lender to ascertain whether a consumer is receiving a payment under the *Social Security Act 1991* (Cth) and, if so, to obtain and consider the information in an income statement and a deduction statement for the consumer issued by Centrelink (Services Australia) for the previous 21 days.

5. While the Committee notes the comment in the Explanatory Statement that this prescribed verification information recognises the increased risks that these credit products pose to consumers, the Committee is of the view that this prescribed requirement is not strictly necessary, because information of this character should be collected and assessed under the existing general obligation of credit licensees to assess and verify a consumer's financial situation under sections 115 and 117 of the NCCPA. The Committee considers that credit licensees are already accustomed to collecting bank statements for the preceding three-month period from prospective borrowers and, for this reason, the Committee believes that the proposed 21-day requirement would introduce complexity without conferring any obvious benefit.
6. The Committee supports the additional privacy protections imposed on income and deduction statements under proposed regulation 28LCC as constrained documents, but considers that this restriction could apply without the need to prescribe the collection of this information in the relevant circumstances.
7. As the Explanatory Statement recognises, the income and deduction statements do not cover all social security type payments, and therefore the Committee questions whether this will satisfy the policy objective of addressing the increased risk that vulnerable consumers on social security benefits may suffer hardship as a result of entering into a SACC.

#### **Regulation 28LCA—SACCs—income requirements**

8. Proposed regulation 28LCA(2) prescribes that the aggregate amount of repayments under the SACC to be provided by the licensee, and any other SACC loan repayments, must be no more than 10 per cent of the available income that the consumer is "reasonably expected" to receive during the repayment period. The repayment period may be either:
  - (a) the period from the day the contract is entered into to the first repayment date; or
  - (b) the period for subsequent repayments (which are required to be equal).

In the Committee's view, this drafting raises two potential technical issues.

9. The first issue is that there does not appear to be any allowance for the practical consideration that the income payments received by a consumer may not align to the loan repayment obligations. The Committee submits that, therefore, the drafting should recognise this by allowing for averaging of the income received, or reasonably expected to be received, by the consumer over the life of the loan, as opposed to the repayments the consumer is committed to making under SACC contracts they have entered.
10. Further, to the extent that there are two repayment period lengths (being the opening repayment period and the repayment period for the balance of the loan over the life of any SACC contract), it is conceivable that a particular loan proposal would be acceptable in relation to one of these repayment periods and not acceptable in relation to the other, depending on the timing of income receipts and other SACC repayment obligations.

11. Secondly, the definition of “available income”, being the consumer’s income “less any amount required to be withheld under Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**)”, is not, as the Committee understands it, the same as PAYG withholding. Withholding payments under this Part of the TAA refers to amounts withheld for other reasons, such as failure to provide a tax file number (**TFN**) to one’s employer or financial institution, as well as foreign residents and the like. “Withholding Payment” under Part 2.5 of this legislation refers to withheld payments due to reasons such as failing to provide a TFN, receipt of overseas royalty payments and the like. It does not refer to amounts withheld by reason of estimated income tax payment obligations. In the Committee’s view it would be more appropriate to determine available income by reference to PAYG withholding.

#### **Regulation 28LCB—Consumer leases for household goods—income requirements**

12. The Committee has the same comments in relation to income requirements consumer leases as those which it has made relating to SACC loans in the context of proposed Regulation 28LCA above.

#### **Regulation 28LCC—Constrained documents and constrained information**

13. The Committee supports the proposed additional privacy protections relating to these documents.

#### **Regulation 105AA—Base price of goods**

14. This Regulation provides, in effect, that the base price on which the lease repayments are calculated is to be the lesser of:
  - (a) the agreed price of the goods; and
  - (b) if new, the goods’ recommended retail price or price paid by the lessor on purchase from a supplier who ordinarily sells goods of that kind to the public. If no recommended retail price can reasonably be determined, or the lessor did not purchase from a supplier in the business, then the market value (being the fair market value) of the goods on the day the lease was entered into is applicable.
15. Additional considerations apply if the goods are “not new”. That is, that a discount on this price applies as follows:
  - (a) if the period between when the goods were last acquired “new” and the day on which they were leased is 12 months or less—a discount of 12.5 per cent applies to that price;
  - (b) if the period is more than 12 months but less than 24 months—a discount of 25 per cent applies;
  - (c) if the period is more than 24 months but less than 36 months—a rate of 37.5 per cent applies; and
  - (d) if the period is 36 months or more—a rate of 50 per cent applies.

The Committee has two points to raise on this issue.

16. Firstly, the Committee submits that it may be worthwhile to define what “new” means in the interests of clarity. While one would normally consider “used” goods to be goods that have been acquired by and utilised by a consumer for their intended end purpose, there are also scenarios where goods may have remained in stock for a substantial period and deteriorated as a result, with the outcome that they are effectively depreciated in the same way, or more than, goods that have been used in the ordinary sense. Examples may be, for example, dishwashers or other household equipment with rubber seals or motors which need to be run or otherwise used periodically to maintain their effectiveness and efficiency.
17. Secondly, the Committee wishes to raise the incentive effects of the proposed arrangements for determining the base price of new goods. Many consumer lease businesses may wish to advertise frequently purchased goods on their website or in printed materials at a certain price. The Committee submits that the requirements for the calculation of base price make this difficult, as the lessor will not be in a position to know the base price unless it maintains inventory of all these goods.
18. For example, if a lessor operates on the basis of an agreed price in its lease documentation, but finds that at the time a lease is entered, the recommended retail price has dropped below this level or indeed that its supplier has dropped its prices, then:
  - (a) its advertised pricing will not be correct; and
  - (b) it will be required to recalculate lease payments and disclosures on the basis of the lower price.

While this provides a benefit to consumers in the sense that they are obtaining the goods for a lower price and cost than advertised, it requires constant vigilance on the part of lessors and excellent stock control to ensure that the correct base price is applied.

19. The Committee notes that there is no incentive under these arrangements for a lessor to obtain the best possible price from its suppliers. Indeed, it may well prefer to agree fixed, and higher prices, with these suppliers in order to avoid these compliance difficulties. The Committee suggests that these concerns could be reduced, for example, if subparagraph 3(a)(ii) was amended to refer not to the “price that the lessor paid for the goods” but to the “price at which the goods are ordinarily sold to the public”.

#### **Regulation 40—avoidance schemes**

20. As a broad matter of principle, the Committee questions the appropriateness of implementing an anti-avoidance scheme, potentially imposing very substantial penalties, which may be activated by a regulation-making power.
21. Having had the opportunity to consider regulation 40, the Committee considers that it is broadly measured and proportionate to the reasonable aims of managing avoidance activity.

22. In particular, the Committee supports as the main criteria to which the Court must have regard under the regulation:
  - (a) the concept of avoidance purpose by reference to the applicability of paragraphs 5(1)(c), 6(1) or 6(5), which are intended as (and widely relied on as) complete exemptions from the National Credit Code when appropriately implemented, for example in providing time-to-pay for non-financial goods and services; and
  - (b) the aspects of an arrangement that must be considered as aspects of “complexity”, being specifically defined by reference to additional parties who serve to increase the minimum amount which the consumer must pay.
23. Nevertheless, the Committee submits that the operation of this Regulation should be subject to ongoing monitoring. For example, proposed regulation 40(5), which considers whether internal and external dispute resolution systems are present, will be of little use in determining the application of the anti-avoidance provision to common properly exempt activities. By way of illustration, where school fees or utility bills offer deferred payment terms, it is not expected that NCCPA standard internal or external dispute resolution systems will be available, as these types of activities are properly in the non-regulated economy (outside the NCCPA regime).
24. Likewise if a particular arrangement is not SACC-like, the Committee submits that the question of whether or not a particular fee or charge might be imposed in the same way if the arrangement were a SACC may not have strong determinative power. The Committee notes that revolving arrangements are specifically contemplated by the NCCPA and are not SACCs. The Committee submits that there should not be any place for an argument to be made that, by choosing to offer a revolving facility with a different fee structure than SACCs, a provider is implementing a scheme to avoid the SACC regime.

#### **Regulation 41—separate submission**

25. Finally, please note that the Committee will be providing a separate submission in response to the exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Anti-avoidance rule for product intervention orders*, which will comment on proposed regulation 41.

26. If Treasury has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee ([pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com)).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy**  
**Chairman**  
**Business Law Section**